

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO, DIVISION**

V.K. KNOWLTON CONSTRUCTION
& UTILITIES, INC.
18225 FM 2252
San Antonio, Texas 78266

Plaintiff,

VS.

Civil Action No.: 5:12-1197

SECRETARY OF THE AIR FORCE
1670 Air Force Pentagon
Washington, DC 20330-1670

Defendant

COMPLAINT

Plaintiff, V. K. KNOWLTON CONSTRUCTION & UTILITIES, INC., brings this action against the SECRETARY OF THE AIR FORCE to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”). As grounds therefore, Plaintiff alleges as follows:

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.
2. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

PARTIES

3. Plaintiff, V. K. KNOWLTON CONSTRUCTION & UTILITIES, INC., is a Texas corporation, organized and existing under the laws of the State of Texas, with its principal office and place of business located at 18225 FM 2252, San Antonio, Texas 78266. Plaintiff is engaged in the business of construction for public, commercial and residential projects.

4. Defendant, SECRETARY OF THE AIR FORCE, is an agency of the United States Government and is headquartered at 1670 Air Force Pentagon, Washington, D.C. 20330-1670. Defendant has possession, custody, and control of the public records to which Plaintiff seeks access.

STATEMENT OF FACTS

5. On July 11, 2011, Plaintiff submitted a FOIA request to the Freedom of Information Act Manager ("FOIA Manager") 502 ABW/JB60KR9(FOIA), 355 B. Street West, Suite 1, Randolph AFB, Texas 78150-4517, a component of Defendant.¹ See Attached Exhibit "A" (copy of July 11, 2011 FOIA Request).

6. On July 12, 2011, the FOIA Manager informed Plaintiff, among other things, that: (1) the Air Force had received Plaintiff's 11 July 2011, FOIA request; (2) Plaintiff's request for expedited processing had been approved and the request would be processed as soon as practicable; (3) the agency has 20 duty days to submit a formal

¹ The FOIA request at issue herein was initiated by counsel for Plaintiff on Plaintiff's behalf.

response to the request; (4) Plaintiff should receive a response no later than 5 May 2011(sic); and, (5) if the 20 day suspense, could not be met Plaintiff would be notified.

7. On July 15, 2011, the FOIA Manager informed Plaintiff that Plaintiff's FOIA request had been referred to the Air Force Center for Engineering and the Environment (AFCEE) FOIA Office, 3515 General McMullen, San Antonio TX 78226-2018. This letter further informed Plaintiff that the AFCEE would be processing Plaintiff's request and providing a direct response.

8. On August 25, 2011, a Freedom of Information Act Analyst with the 88th Communications Squadron Information Management Branch ("88CS FOIA Manager") informed Plaintiff that Plaintiff's request for expedited processing [which had previously been approved] was now being disapproved to allow time for the outside contractor to review the contract records relevant to Plaintiff's FOIA request.² Included with the August 25, 2011 letter was a "Request Details Report" which identified the "Original Target Date" to be 08/09/2011; the "Target Date" to be 08/23/2011; and, the "Estimated Delivery Date" to be 08/09/2011.

9. On August 31, 2011, the 88CS FOIA Manager informed Plaintiff that an initial determination relating to the request is that the requested records "may be partially/fully denied in accordance with United States Code, Title 5, Section 552(b)(4). The 88CS FOIA Manager further informed Plaintiff that they would be unable to meet

² In denying Plaintiff's request for expedited processing, the government cited Executive Order 12600. Under Executive Order 12600 the contractor must be given a "reasonable period of time" to object to the disclosure and to state the grounds on which the objection(s) is/are based. *See* E.O. 12600, Sec. 4. (June 23, 1987).

the time limits imposed by the FOIA in this instance because the contracts may contain confidential commercial information that will most likely be redacted prior to release and that they needed to provide the contractor with “*a reasonable time (up to 30 days) to object to disclosure.*” Finally, the 88CS FOIA Manager stated that they [i.e. the government] anticipate providing a more comprehensive response no later than 23 September 2011.

10. On September 1, 2011, the 88CS FOIA Manager informed Plaintiff that the total cost to process Plaintiff’s FOIA request was determined to be \$7,370.00 of which \$4,211.00 would be invoiced. The 88CS FOIA Manager further informed Plaintiff that unless Plaintiff agreed in writing to pay the \$4,211.00, no later than September 9, 2011, the government would close the request and no further action would be taken.

11. On September 9, 2011, Plaintiff delivered written notification to the 88CS FOIA Manager confirming that Plaintiff “*agrees to pay the \$4,211.00 in costs associated with the production of the documents responsive to our request.*”

12. On September 29, 2011, Plaintiff contacted the 88CS FOIA Manager requesting a status on the pending FOIA request.

13. On September 30, 2011, the 88CS FOIA Manager informed Plaintiff that the documents responsive to Plaintiff’s FOIA request were in “legal review”. The 88CS Manager further informed Plaintiff that they anticipated the review to be completed by October 7, 2011 and that the government should have an approximate release date at that time.

14. On October 17, 2011, Plaintiff once again contacted the 88CS FOIA Manager requesting a status on the pending FOIA request.

15. In response, on October 17, 2011, the 88CS FOIA Manager informed Plaintiff that the documents were still in legal review and that once the review had been completed the government would be able to provide Plaintiff with an anticipated release date.

16. On December 16, 2011, Plaintiff contacted the 88CS FOIA Manager requesting a status on the pending FOIA request.

17. On December 20, 2011 the 88CS FOIA Manager informed Plaintiff that he had requested a status update from the "Office of Primary Responsibility" and would provide more information once it became available.

18. On January 17, 2012, the 88CS FOIA Manager informed Plaintiff that the government would require another extension of time to process the request. Additionally, Plaintiff was instructed that the government intended to respond no later than March 12, 2012.

19. On April 2, 1012, the 88 CS FOIA Manager informed Plaintiff that the government would require another extension of time to process the request. Additionally, Plaintiff was instructed that the government intended to respond no later than June 15, 2012. Finally, the 88CS FOIA Manager informed Plaintiff of its right to appeal this decision within sixty (60) days of the date of the letter.

20. On May 31, 2012, Plaintiff filed a timely appeal of the Agency's April 2, 2012, decision to request additional time to release the documents responsive to the FOIA

Request. In its appeal, Plaintiff provided a detailed Chronology of the events set forth above. Additionally, after citing the twenty day (20) statutory deadline set forth in 5 U.S.C. § 552(a)(6)(A)(i), Plaintiff informed the Air Force that it had yet to provide any final response determination or any basis for properly withholding any of the documents that had been requested.

21. On June 1, 2012, the 88CS FOIA Manager confirmed receipt of Plaintiff's timely appeal [identified as Appeal No. 2012-00118-A ST3] and listed himself as the point of contact for said appeal. Additionally, the 88CS FOIA Manager attached a "Request Details Report" which identified the "Original Target Date" to be 06/29/2012; the "Target Date" to be 06/29/2012; and, the "Estimated Delivery Date" to be 06/29/2012.

22. On June 26, 2012, the 88CS FOIA Manager requested an extension of time to respond to Plaintiff's FOIA request and FOIA Appeal [until August 13, 2012] without any explanation whatsoever as why the government had not yet completed their review or why these extensions were somehow necessary.

23. On August 14, 2012, the 88 CS FOIA Manager requested, yet again, another extension of time respond to Plaintiff's FOIA request and FOIA Appeal [this time until October 15, 2012] without any explanation whatsoever as why the government had not yet completed their review or why this extension was somehow necessary.

24. On October 16, 2012,, the 88 CS FOIA Manager requested, yet again, another extension of time respond to Plaintiff's FOIA request and FOIA Appeal [this time until December 15, 2012] without any explanation whatsoever as why the

government had not yet completed their review or why this extension was somehow necessary.

25. Pursuant to 5 U.S.C. 552(a)(6)(A)(ii), the government was required to make a determination with respect to Plaintiff's appeal within twenty (20) working days after its receipt of the appeal, or by June 21, 2011.

26. As of the date of this filing, the government has failed to make a determination with respect to Plaintiff's appeal.

27. Because the government has failed to comply with the time limits set forth in 5 U.S.C. § 552(a)(6)(A)(ii), Plaintiff is deemed to have exhausted any and all administrative remedies with respect to its FOIA request pursuant to 5 U.S.C. § 552(a)(6)(C).

28. At this point, Plaintiff's FOIA request has been pending for more than five hundred and eight (508) days. Most importantly, although it is clear from the government's September 1, 2011 communication that the government has already identified and counted all of the documents responsive to Plaintiff's FOIA request, Plaintiff has never been provided any responsive documents; any explanation whatsoever as to why the government has not yet completed their review of the responsive documents; or, any explanation whatsoever as to why the seemingly endless extensions are somehow necessary.

COUNT 1
(Violation of FOIA, 5 U.S.C. § 552)

29. Plaintiff realleges paragraphs 1-25 as if fully stated herein.

30. Defendant is unlawfully withholding public records requested by Plaintiff pursuant to 5 U.S.C. § 552.

31. Plaintiff is being irreparably harmed by reason of Defendant's unlawful withholding of the requested public records, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to conform its conduct to the requirements of the law.

COUNT 2
(Violation of the APA, 5 U.S.C.A. §§ 501 et seq.)

32. Plaintiff realleges paragraphs 1-28 as if fully stated herein.

33. Defendant's actions reflect an arbitrary and capricious disregard of the government's obligations under FOIA. Such disregard also constitutes an abuse of discretion.

34. Plaintiff is being irreparably harmed by reason of Defendant's actions, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to conform its conduct to the requirements of the law.

WHEREFORE, Plaintiff respectfully requests that the Court: (1) order Defendant to conduct a search for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request; (2) order Defendant to produce, by a date

certain, any and all non-exempt records responsive to Plaintiff's FOIA request and a *Vaughn* index of any responsive records withheld under claim of exemption; (3) enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request; (4) grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and, (5) grant Plaintiff such other relief as the Court deems just and proper.

Dated this the 18th day of December, 2012

Respectfully Submitted,

By:



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